

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
MMK License LLC	)	
	)	CSR-6382-N
Petition For Waiver of Sections 76.92(f) and	)	
76.106(a) of the Commission's Rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 24, 2007**

**Released: January 25, 2007**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. MMK License LLC, licensee of television broadcast station WNKY (NBC, Ch. 40), Bowling Green, Kentucky ("WNKY"), filed the captioned petition seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of "significantly viewed" stations under the network nonduplication and syndicated exclusivity rules ("exclusivity rules").<sup>1</sup> Mediacom Southeast LLC ("Mediacom"), filed an opposition to this petition to which WNKY replied.<sup>2</sup> For the reasons discussed below, we deny WNKY's waiver request.

**II. BACKGROUND**

2. Upon the request of a local television station with exclusive rights to distribute a network or syndicated program, a cable operator generally may not carry a duplicating program broadcast by a distant station.<sup>3</sup> Under Sections 76.92(f) and 76.106(a) of the Commission's rules, however, a signal

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<sup>1</sup>47 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in WNKY's petition for waiver of Sections 76.92(f) and 76.106(a) (significantly viewed exception to cable network nonduplication and syndicated exclusivity), a waiver of Sections 76.122(j) and 76.123(k) (significantly viewed exception to satellite network nonduplication and syndicated exclusivity) would also appertain based on the same showing that a station is no longer significantly viewed in the relevant community; *see* 47 C.F.R. §§ 76.92(f), 76.106(a), 76.122(j), and 76.123(k). *See* 47 U.S.C. §§ 340(a)(2) and 340(c). We also take this opportunity to remind petitioners that, in accordance with Section 76.7(c)(3), petitions should be accompanied by certificate of service showings that affected cable operators, stations and interested persons, including satellite carriers, have been served; 47 C.F.R. § 76.7(c)(3).

<sup>2</sup>Mediacom serves the communities of Morgantown, Edmonton, Summer Shade, Munfordville, and Brownsville, Kentucky.

<sup>3</sup>*See* 47 C.F.R. §§ 76.92 and 76.101.

otherwise subject to deletion is exempt from application of the exclusivity rules if it is “significantly viewed” in a relevant community (the “significantly viewed exception”).<sup>4</sup> The Commission’s rules generally provide stations such protection within a station’s 35-mile geographic zone.<sup>5</sup> The significantly viewed exception to the exclusivity rules is based on a demonstration that an otherwise distant station receives a “significant” level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the application of the exclusivity rules because it has established that it is viewed over the air in the subject community.

3. In the 2005 Report and Order implementing Section 340 of the Communications Act, the Commission adopted a rule for satellite carriage that mirrors the rules for cable carriage.<sup>6</sup> Accordingly, the amended Sections 76.122(a) and (j) and 76.123(a) and (k) of the Commission’s rules allow a station or distributor with exclusive rights to network or syndicated programming to assert exclusivity protection to require satellite carriers to delete such programming. The duplicating station may respond to such assertions by claiming the significantly viewed exception.<sup>7</sup> The party asserting exclusivity protection may request a waiver of the significantly viewed exception from the Commission by demonstrating that the station is no longer significantly viewed in a particular community or communities.<sup>8</sup> If the waiver is granted, the duplicating programming must be deleted by a cable operator or satellite carrier if the station is carried in a community in which the station has been shown to no longer be significantly viewed. It should be noted that the station itself is not removed from the significantly viewed list and may continue to be carried, provided the necessary programming deletions are made.<sup>9</sup>

4. In order to obtain a waiver of the significantly viewed exception to the exclusivity rules, the Commission held in *KCST-TV, Inc.*<sup>10</sup> that petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, following the methodology set forth in Section 76.54(b) of the Commission’s rules.<sup>11</sup> For each year, the data must be the result of independent professional surveys taken

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<sup>4</sup> 47 C.F.R. §§ 76.92(f) and 76.106(a); see 47 C.F.R. §§ 76.5(i) and 76.54.

<sup>5</sup>The 35-mile geographic zone of all major markets and the 55-mile geographic zone around all smaller markets extend from the reference point of the community of license of the television station. These reference points are listed in Section 76.53 of the Commission’s rules. Where a community’s reference point is not given, the geographic coordinates of the main post office in the community shall be used. See 47 C.F.R. §§ 73.658 and 76.53.

<sup>6</sup>*Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278 (2005) (“*SHVERA Significantly Viewed Report and Order*”).

<sup>7</sup>47 C.F.R. §§ 76.122(j)(2) and 76.123(k)(2).

<sup>8</sup>See *KCST-TV, Inc.*, 103 FCC 2d 407 (1986).

<sup>9</sup>See *SHVERA Significantly Viewed Report and Order* at ¶¶ 39-41; see also 47 U.S.C. § 340(e)(2).

<sup>10</sup>103 FCC 2d 407 (1986).

<sup>11</sup> Section 76.54(b) describes the required survey procedures for adding a station to the significantly viewed list based on community or system-specific surveys. For the addition of a station to the list, only one year’s surveys are required. In *KCST*, the Commission required that the data demonstrate viewing levels for two years. In the *SHVERA Significantly Viewed Report and Order*, we clarified that the independent professional audience surveys required by Section 76.54 of our rules must include surveys only from households that receive broadcast signals via an over-the-air antenna and thus amended Section 76.54 to change “noncable” to “over-the-air.” See *SHVERA Significantly Viewed Report and Order* at ¶ 32.

during two one week periods separated by at least 30 days, the viewing samples must be distributed proportionately among the relevant cable communities, and not more than one of the surveys may be taken between April and September of each year.<sup>12</sup> Under Section 76.5(i) of the Commission's rules, network stations<sup>13</sup> are considered significantly viewed if the survey results show more than a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.<sup>14</sup> Independent stations (*i.e.*, non-network stations), are considered significantly viewed if the survey results show more than a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.<sup>15</sup> The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.<sup>16</sup>

### III. DISCUSSION

5. WNKY seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against station WSMV-TV (NBC, Ch. 4), Nashville, Tennessee ("WSMV-TV").<sup>17</sup> WSMV-TV is considered to be significantly viewed in Barren, Butler, Edmonson, Hart, Metcalfe and Warren Counties, Kentucky, where the communities served by Comcast Corporation, Mediacom Communications Corp., South Central Telcom LLC, and Glasgow Electric Plant Board are located.<sup>18</sup>

6. WNKY states that it is licensed to a community in the Bowling Green, Kentucky designated market area ("DMA"), while WSMV-TV is licensed to a community located in the Nashville, Tennessee DMA.<sup>19</sup> WNKY argues that it would normally be entitled to assert exclusivity protection against WSMV-TV, but it cannot because WSMV-TV is considered significantly viewed in the counties of Barren, Butler, Edmonson, Hart, Metcalfe and Warren, Kentucky.<sup>20</sup> WNKY maintains, however, that a Nielsen Media Research "community based rating and share analysis" of "noncable" homes for a two-year period demonstrates that WSMV-TV no longer meets the significantly viewed criteria in the communities

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<sup>12</sup>See 47 C.F.R. §76.54(b).

<sup>13</sup> For purposes of determining whether to use the network or non-network standard for audience share, the Commission relies on the definition of network and independent station in our rules. Thus, for such purposes, affiliates of the ABC, CBS, and NBC networks are "network stations." See 47 C.F.R. §76.5(j) and (k). Other stations are treated as independent stations for this limited purpose. See 47 C.F.R. §76.5(j); *SHVERA Significantly Viewed Report and Order* at ¶¶ 33-36.

<sup>14</sup>47 C.F.R. §76.5(i).

<sup>15</sup> *Id.*

<sup>16</sup>See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

<sup>17</sup>Petition at 1.

<sup>18</sup>*Id.* at 1-2. WNKY states that the communities at issue are: Columbia, Cave City, Glasgow, Brownsville, Mammoth Cave, Horse Cave, Munfordville, Edmonton, and Bowling Green, Kentucky. WNKY originally also requested that the communities of Morgantown and Summer Shade be included in the waiver request, but it withdrew their inclusion in its reply. In addition, after it was pointed out in opposition that Brownsville and Mammoth Cave should not be treated as a combined community for survey purposes because they are served by two different cable systems, WNKY submitted separate data for Brownsville. See Reply at 5. WNKY does not withdraw its waiver request for Mammoth Cave, but has not submitted separate audience data for that community.

<sup>19</sup>*Id.* at 3.

<sup>20</sup>*Id.*

served by the subject cable systems.<sup>21</sup>

7. Mediacom opposes WNKY's petition on procedural grounds<sup>22</sup> and also challenges the methodology that WNKY used in its survey.<sup>23</sup> First, Mediacom states that WNKY failed to serve a copy of its petition on all interested parties, as required by Section 76.7(a)(3).<sup>24</sup> Specifically, WNKY failed to serve Kentucky Partners II LP, the cable system serving Bowling Green, Kentucky and the largest community affected by WNKY's proposed waiver, and the local franchising authorities of the individually affected communities.<sup>25</sup> Second, Mediacom states that WNKY failed to provide prior notice that it intended to conduct a significantly viewed audience survey, as required by Section 76.54(c).<sup>26</sup> Mediacom argues that, as a result of this violation, interested parties were denied an opportunity to oversee the survey process for accuracy and fairness.<sup>27</sup>

8. Mediacom also argues that WNKY's survey is inadequate<sup>28</sup> because it lacks a detailed explanation of the methodology used to obtain the audience data it submitted to the Commission, as required by Section 76.92(f).<sup>29</sup> Mediacom states that WNKY provides: 1) no explanation of how its data was derived; 2) no information regarding how the apparent retabulation was performed; 3) no details of the steps taken to ensure that the data adequately represented over-the-air households in the subject communities; 4) no verification or declaration from Nielsen that the tables and data in the petition are the product of Nielsen; 5) no explanation as to how specific Nielsen data was derived from the larger batch of DMA-wide data; and 6) how the standard error was calculated.<sup>30</sup> Mediacom also states that WNKY does not provide any substantiation that the Nielsen surveys selected and reported represent only the over-the-air viewing habits of households in the subject communities or that such samples are statistically reliable given the small number of samples reported for each survey period.<sup>31</sup> Finally, Mediacom analyzes the audience statistics for each of the cable communities it serves and concludes that WNKY fails to demonstrate that WSMV-TV is no longer significantly viewed in each case.<sup>32</sup> Because of these, and other discrepancies in the surveys, Mediacom asserts that WNKY's petition with respect to the communities it serves should be

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<sup>21</sup>*Id.* at Exhibit 1.

<sup>22</sup>Mediacom argues that WNKY's petition should be denied for violating Sections 76.7(a)(3) and 76.54(c) of the Commission's rules. Opposition at 2-4, citing 47 C.F.R. §§ 76.7(a)(3) and 76.54(c).

<sup>23</sup>*Id.* at 5.

<sup>24</sup>*Id.* at 3, citing 47 C.F.R. § 76.7(a)(3).

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 4, citing 47 C.F.R. § 76.54(c).

<sup>27</sup>*Id.* at 4-5.

<sup>28</sup>*Id.* at 5.

<sup>29</sup>*Id.* at 5-6, citing 47 C.F.R. § 76.92(f).

<sup>30</sup>*Id.* at 6.

<sup>31</sup>*Id.* at 8.

<sup>32</sup>Specifically, Mediacom states that 1) Brownsville and Mammoth Cave cannot be combined because they are separate communities, not adjacent to one another, and Mediacom serves only Brownsville; 2) for Morgantown, Edmonton, and Summer Shade, WSMV-TV's reported audience exceeds the significantly viewed criteria in at least one sweep period; and 3) for an entire reporting period, Nielsen reports no diaries being placed in Munfordville. See Opposition at 9-13.

denied.<sup>33</sup>

9. In reply, WNKY argues that, after being made aware of its failure to serve certain parties with a copy of its petition, it corrected this error on September 30, 2004.<sup>34</sup> Further, WNKY states that Mediacom has misinterpreted Section 76.54(c) of the rules. WNKY argues that the Commission has found that Section 76.54(c) applies only when a station is seeking to obtain significantly viewed status, rather than when a station is seeking to prove the reverse.<sup>35</sup> WNKY maintains that because it is relying on Nielsen surveys, whose methodology and procedures have long been accepted by the Commission and because a grant of its request would not result in a reduction of available network programming, Section 76.54(c) is not applicable.<sup>36</sup> In addition, WNKY asserts that its methodology is neither flawed nor incomplete.<sup>37</sup> WNKY states that it used community-specific Nielsen data, conducted over four-week “sweeps” periods during May 2002, February 2003, May 2003 and February 2004.<sup>38</sup> WNKY argues that these type of surveys follow established practices and have been found to be acceptable by the Commission.<sup>39</sup> Moreover, despite Mediacom’s assertions, WNKY argues that it has met the requirements of the significantly viewed exception waiver standard for the communities of Brownsville, Munfordville and Edmonton.<sup>40</sup>

10. Initially, we reject, in part, Mediacom’s contention in its opposition<sup>41</sup> that WNKY failed to comply with Section 76.54(c) of the Commission’s rules.<sup>42</sup> Section 76.54(c) requires that an entity intending to conduct a viewership survey provide comprehensive notice to all interested parties.<sup>43</sup> Such a notice must include, for example, the method for choosing the sample to represent the subject communities or systems; most notably the list of zip codes and the survey periods chosen to meet the requirements of *KCST-TV*. In *Amendment of Parts 1, 63, and 76 of the Commission’s Rules to implement the Provisions of the Cable Communications Policy Act of 1984*, the Commission noted that “[w]e would not read the advance notice provisions of Section 76.54(c) (advance notice of survey methodology to other interested parties) as precluding use of data already collected based on methodology previously approved by the Commission. In such cases, notice to other interested parties prior to purchase of data would suffice.”<sup>44</sup> In

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<sup>33</sup>*Id.* at 9-13.

<sup>34</sup>Reply at 3.

<sup>35</sup>*Id.*, citing *Delmarva Broadcast Service*, 14 FCC Rcd 10509 (1999).

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at 4.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*, citing *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568 n.13 (1996).

<sup>40</sup>*Id.* at 5-8.

<sup>41</sup>See Opposition at 2-3. We note that while WNKY initially failed to serve a copy of its petition on all interested parties, as required by Section 76.7(a)(3), WNKY subsequently corrected this failure in time to allow any interested parties to respond. As a result, the issue is moot.

<sup>42</sup>See 47 C.F.R. § 76.54(c) (“Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour . . . the cable or satellite community or communities are located, in whole or in part, and on all cable system community units, franchisees, and franchise applicants in the cable community or communities. . . .”).

<sup>43</sup>See 47 C.F.R. § 76.54(c).

<sup>44</sup>See 3 FCC Rcd 2617, 2629 n.23 (1988).

this instance, WNKY was relying on data previously collected by Nielsen via a methodology long accepted by the Commission. As a result, while we find that WNKY did not violate Section 76.54(c) of the rules by not providing Mediacom with proposed survey methodology data, WNKY did fail to notify Mediacom of its intention to purchase previously collected data from Nielsen.<sup>45</sup>

11. Furthermore, WNKY's petition has failed to adequately explain the methodology it used to obtain the data it submitted. We find WNKY's showing insufficient under *KCST-TV*, the Commission's rules,<sup>46</sup> and previous decisions.<sup>47</sup> *KCST-TV* established the methodology required to support waivers based on Section 76.54(b).<sup>48</sup> In a subsequent decision, *Radio Perry*, the Commission observed that the *KCST-TV* decision required that a petitioner must show that a station has not met the standards for significant viewing for two consecutive years using the methodology mandated by Section 76.54(b).<sup>49</sup> In *Radio Perry*, we concluded that the submitted data appeared to be an otherwise acceptable retabulation of Nielsen's routine audience sweep diaries. The submission in *Radio Perry* was rejected, however, because the submitted retabulation failed to describe how the routine Nielsen data were used to provide a representative sample for purposes of demonstrating that over-the-air viewing no longer met the criteria for significantly viewed status.<sup>50</sup> As in *Radio Perry*, we find that WNKY did not include a proper description of the methodology it relied on in its initial petition and the submission of a description of Nielsen's methodology submitted in an Exhibit to its Reply does not appear to match the original data submitted.<sup>51</sup> In any event, even assuming that the reference in this Exhibit was an oversight, it is not a description of the methodology for the audience data submitted in the petition nor do the tables of audience statistics submitted with the petition include any notations or documentation that they were prepared by Nielsen.

12. Finally, the survey data provided by WNKY appear to be based on noncable viewing, and not off-air viewing, as required. In the petition, WNKY states that the audience data are from noncable homes, as does the Nielsen description attached to the reply. Based on Nielsen's practice of specifically stating when the retabulation only includes off-air (*i.e.*, noncable, non-ADS) homes, it would appear that the data do not exclude MVPD households other than the cable households. The Commission has recently restated its view, based on the original intent of the rules, that significant viewing is to be based on off-air viewing and that significant viewing surveys should not include data from satellite households. Consequently, we cannot accept the survey data submitted by WNKY because it includes satellite

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<sup>45</sup>In this regard, there is no evidence in the record indicating that Mediacom was prejudiced by WNKY's omission. We, however, expect WNKY to meet the requirements set out in Section 76.54 in any future proceedings.

<sup>46</sup>47 C.F.R. § 76.54(c).

<sup>47</sup>Given our action herein, we need not address the specific issues raised by Mediacom regarding the methodology and whether the submitted audience statistics demonstrate that WSMV-TV is no longer significantly viewed in the communities it serves.

<sup>48</sup>*KCST-TV, Inc.*, 103 FCC 2d 407 at ¶¶ 10-11; *see also* 47 C.F.R. § 76.54(b).

<sup>49</sup>*Radio Perry*, 11 FCC Rcd 10568 at ¶ 9.

<sup>50</sup>*Id.* at 10568-9 ¶ 10. The petition also was rejected because the standard errors for the audience estimates were omitted. *Id.* at ¶ 11.

<sup>51</sup>*See* Reply at Exhibit 1. Specifically, the Nielsen information is titled "Significant Viewing Study WNKY-TV" and states that "[t]he attached report provides . . . for WNKY-TV . . ." However, the station for which the petitioner is seeking to demonstrate is no longer significantly viewed is WSMV-TV.

households.<sup>52</sup>

### III. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, that the petition filed by MMK License LLC **IS DENIED**.

14. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>53</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
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<sup>52</sup>See *SHVERA Significantly Viewed Report and Order* at ¶ 32. (“It would also be inconsistent with the original intent of the [significantly viewed] process to permit satellite carriers to use their own subscribers in audience surveys to demonstrate [significantly viewed] status.”).

<sup>53</sup>47 C.F.R. §0.283.